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10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

12 RAYNE DEE WELLS JR,

13 Plaintiff,

14 v.

15 JOHN DOE MCLEAN et al.,

16 Defendants.

CASE NO. C10-5097-RJB-JRC

REPORT AND RECOMMENDATION

NOTED FOR: APRIL 27, 2012

17 This 42 U.S.C. § 1983 civil rights matter has been remanded from the Ninth Circuit so
18 that the Court can consider whether the dismissal in this case should be with or without
19 prejudice. The Ninth Circuit affirmed the dismissal of the action (ECF No. 40). The Court
20 recommends that the dismissal be without prejudice.

21 FACTS

22 Plaintiff is an inmate and under the terms of the Prison Litigation Reform Act ("PLRA")
23 he must exhaust the prison's administrative remedies prior to his filing any action challenging his
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1 conditions of confinement. See 42 U.S.C. § 1997e (a). Plaintiff was infracted for not following
2 his religious diet plan and he was forced to pay three dollars to obtain a new identification badge
3 listing his new diet. He filed a timely grievance; he received a response; e then filed an appeal.
4 Plaintiff was not in the facility when the level two appeal response was signed as he was
5 temporarily out for a court appearance (ECF No. 12). The parties disagree on when plaintiff
6 received the level two appeal, but at the latest it was June 27, 2007 (ECF No. 19). Under the
7 prison's grievance procedure rules, plaintiff had two days to file a level three appeal. Plaintiff
8 waited until January of 2010, nearly two and one half years, before attempting to file an appeal
9 to level three. The level three appeal was rejected as untimely.

10 DISCUSSION

11 In the Ninth Circuit, failure to exhaust administrative remedies has historically resulted in
12 dismissal without prejudice. Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2003). It is an affirmative
13 defense, not a pleading requirement. Wyatt, 315 F.3d at 1117. It is not a decision on the merits
14 and should be treated as a matter in abatement. Wyatt, 315 F.3d at 1119. Historically, the court
15 has discretion when to apply abatement and the court can take into account equitable
16 considerations. The decision in Wyatt clearly applies when the inmate can return and exhaust his
17 administrative remedies. It is less clear whether it applies when the inmate is prevented from
18 exhausting his administrative remedies by the rules of the grievance procedure and is therefore
19 unable to exhaust his claims.

20 Three years after the Wyatt decision, the United States Supreme Court decided Woodford
21 v. Ngo, 548 U.S. 81 (2006). The Supreme Court held that exhaustion of administrative remedies
22 was no longer discretionary. Woodford, 548 U.S. at 85. The Supreme Court adopted a rule that a
23 prisoner must "properly exhaust" administrative remedies. Woodford, 548 U.S. at 93, which
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1 means that the prisoner must follow the rules and procedures of the administrative process.
2 Woodford, 548 U.S. at 93. The majority opinion of the Supreme Court did not specifically
3 address whether dismissals for failure to exhaust administrative remedies should be with or
4 without prejudice.

5 On remand the Ninth Circuit affirmed dismissal of the action, but the opinion does not
6 state whether the dismissal was with or without prejudice. Ngo v. Woodford, 539 F.3d 1108 (9th
7 Cir. 2008). Since the Woodford decision, at least one district court in the Ninth Circuit has
8 questioned the continued validity of Wyatt. Frantz v. Schriro, 2006 WL 2772830 (D. Ariz.
9 2006). The court stated:

10 Further, “the PLRA exhaustion requirement requires proper exhaustion.”
11 Woodford v. Ngo, --- U.S. ---, 126 S.Ct. 2378 (2006). Thus the statute requires
12 that “a prisoner must complete the administrative review process in accordance
13 with the applicable procedural rules, including deadlines, as a precondition to
14 bringing suit in federal court.” *Id.* at 4. “If the district court concludes that the
15 prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal
of the claim without prejudice.” Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th
Cir.), *cert. denied*, 124 S.Ct. 50 (2003). *But see* Woodford, --- U.S. at ---, 126
S.Ct. at 2386-2387 (comparing PLRA exhaustion to habeas procedural default
which provides for dismissal with prejudice, thereby implying that improper
exhaustion may require dismissal with prejudice).

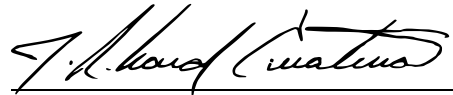
16 The district court in Frantz applied the Wyatt analysis, considered the dismissal as a
17 matter in abatement, and dismissed without prejudice. Frantz v. Schriro, 2006 WL 2772830 at 3.

18 At least one district court in another circuit has rejected the abatement analysis in Wyatt.
19 That court converted a motion to dismiss to a motion for summary judgment because matters
20 outside the pleadings were introduced. That court then granted summary judgment and
21 dismissed the action with prejudice. Benavidez v. Stanberry, 2008 WL 4279559 (N.D. Ohio
22 2008) (inmate did not file a timely grievance, matter considered as summary judgment and
23 dismissed with prejudice).

1 Ninth Circuit precedent is binding on this Court. The Court concludes that under the
2 current state of the law in the Ninth Circuit, the proper course of action is dismissal without
3 prejudice.

4 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
5 fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P.
6 6. Failure to file objections will result in a waiver of those objections for purposes of de novo
7 review by the district judge. See 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit
8 imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on April
9 27, 2012, as noted in the caption.

10 Dated this 3rd day of April, 2012.

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13 J. Richard Creatura
14 United States Magistrate Judge
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